In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-675

ALTON R. BROWN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not render an opinion. The opinion of the court of appeals (Pet. App. 1a–4a) is reported at 464 F. 2d 590.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1972 (Pet. App. 1a). On September 5, 1972, a petition for rehearing with suggestion of rehearing *en banc* was denied (Pet. App. 7a). The petition for a writ of certiorari was filed on November 1, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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er signing corporate papers until he finally decided to terminate the business (R. 73–75).

Because taxes withheld from Gulf's employees for the third calendar quarter of 1967 were not turned over to the government, assessments of $23,987.97 were made against petitioner as a responsible officer (R. 10). Petitioner paid a portion of the tax due and sued for a refund. The government counterclaimed for the remainder (Pet. 5).[3] The case was tried before a jury which, after instructions to which petitioner made no objection, found petitioner liable for the full amount of the assessment. The judgment entered on the jury verdict was affirmed by the court of appeals (Pet. App. 1a–4a).

ARGUMENT

1. Section 6672 of the Internal Revenue Code of 1954, 26 U.S.C. 6672, provides that any person who is required to withhold and pay over taxes and willfully fails to do so is liable for a penalty equal to the total amount of the taxes not paid over. Section 6671(b) of the Code defines "person" as including "an officer or employee of a corporation * * * who as such officer [or] employee * * * is under a duty to perform the act in respect of which the violation occurs." Responsible officer status does not depend on state law con-

[3] Petitioner suggests (Pet. 20–21) that the government was not entitled to prevail on its counterclaim because the assessments were not introduced in evidence. But the assessments were alleged in petitioner's own complaint (R. 5, 7) and admitted by the government in its answer (R. 9), thus making their introduction thereafter unnecessary.

cepts or on mechanical functions often associated with particular corporate offices. Rather it turns on whether the person, regardless of his title, possesses the authority over payment or nonpayment of taxes. *White* v. *United States*, 372 F. 2d 513, 516 (Ct. Cl.). There may be more than one responsible officer, and a showing that someone else was also responsible is not sufficient to defeat application of the statute. *Monday* v. *United States*, 421 F. 2d 1210 (C.A. 7). In general, those "high corporate officials charged with general control over corporate business affairs who participate in decisions concerning payment of creditors and disbursal of funds" are responsible officers under Section 6672. *Monday* v. *United States, supra*, 421 F. 2d at 1214–1215. See also *McCarty* v. *United States*, 437 F. 2d 961 (Ct. Cl.); *Newsome* v. *United States*, 431 F. 2d 742 (C.A. 5). To be responsible for payment over of withheld taxes a person need not have sole authority over expenditures; it is sufficient if he has only authority to prevent default on the payment of the taxes. *Datlof* v. *United States*, 252 F. Supp. 11, 33 (E.D. Pa.), affirmed, 370 F. 2d 655 (C.A. 3), certiorari denied, 387 U.S. 906. The factual determination as to whether one is responsible is, of course, within the jury's province. Here the evidence that petitioner was a necessary cosigner of checks, the sole stockholder, the president who received a salary, the signer of the withholding tax returns, a guarantor of Gulf's loans, and the person who made the final decision as to the termination of Gulf's operations, strongly sup-

ports the jury's verdict that he was responsible for paying over the withheld taxes.[4]

As to petitioner's contention that his conduct was not willful because he had delegated authority to the Bogashes, it is well settled that when a person who is responsible delegates his powers to one who he knows has failed properly to exercise such powers in the past, he has acted willfully. See, *e.g.*, *United States* v. *Leuschner*, 336 F. 2d 246 (C.A. 9).

2. Petitioner also claims error in the court's instructions to the jury. But those instructions essentially incorporated most of petitioner's requested instructions and properly reflected existing law. See, generally, *Monday* v. *United States, supra; McCarty* v. *United States, supra;* and *Newsome* v. *United States, supra.* Moreover, petitioner made no objection to the instructions at the time they were given; to the contrary, he informed the court he had no objection to them. Having failed to object in timely fashion, petitioner may not now complain of the instructions. Rule 51, Fed. R. Civ. P.

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[4] The fact that Satellite was required to countersign checks after August 1967 does not help petitioner here. There is no showing that petitioner, even though he was kept informed of Satellite's operation of Gulf, ever attempted to have the taxes paid or that Satellite ever refused to allow him to make the payments. See *Bloom* v. *United States*, 272 F. 2d 215 (C.A. 9), certiorari denied, 363 U.S. 803, where similar contentions did not relieve a responsible officer from liability.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.
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APPENDIX

The Internal Revenue Code of 1954 (26 U.S.C.) in pertinent part provides:

SEC. 3102. DEDUCTION OF TAX FROM WAGES.

(a) *Requirement.*—The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

(b) *Indemnification of Employer.*—Every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

SEC. 3402. INCOME TAX COLLECTED AT SOURCE.

(a) *Requirement of Withholding.*—Every employer making payment of wages shall deduct and withhold upon such wages (except as otherwise provided in this section) a tax determined in accordance with the following tables.

* * * * *

SEC. 6671. RULES FOR APPLICATION OF ASSESSABLE PENALTIES.

(a) *Penalty Assessed as Tax.*—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary or his delegate, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) *Person Defined.*—The term "person", as used in this subchapter, includes an officer or

employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

SEC. 6672. FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO EVADE OR DEFEAT TAX.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under Section 6653 for any offense to which this section is applicable.

SEC. 7501. LIABILITY FOR TAXES WITHHELD OR COLLECTED.

(a) General Rule.—Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

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